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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

HARVEY L. LERER et al.,

Plaintiffs and Appellants,

v.

STATE COMPENSATION INSURANCE
FUND et al.,

Defendants and Respondents.

B154521

(Los Angeles County
Super. Ct. No. BC197327)

APPEALS from judgments of the Superior Court of Los Angeles County.

Rodney E. Nelson, Judge. Affirmed.

Harvey Lerer and Associates and Steven R. Berardino for Plaintiffs and Appellants.

Sedgwick, Detert, Moran & Arnold, David M. Humiston and Douglas J. Collodel for Defendants and Respondents State Compensation Insurance Fund and Philip Mahaffey.

John Paladin, in pro. per., for Defendant and Respondent John Paladin.

Plaintiffs, Harvey L. Lerer (Lerer) and his law corporations Harvey L. Lerer, Inc., and Harvey Lerer and Associates, appeal from summary judgments, granted first to defendants State Compensation Insurance Fund (SCIF) and Philip Mahaffey, a SCIF attorney, and subsequently to defendant Attorney John Paladin, in a suit for malicious prosecution of a prior action for legal malpractice and fraud. Appellants contend that defendants were not entitled to obtain summary judgment after having moved for it previously, and that the court erred in determining that the underlying action's fraud cause of action was grounded in probable cause, and that plaintiffs had failed to show malice. We affirm the judgments.

FACTUAL BACKGROUND

The underlying action (the malpractice case) arose from Lerer's representation of one Ralph Padilla in a product liability case, after Padilla in December 1986 was injured in a fall from a telephone pole, on which he had been working for a cable television company. In 1987, Lerer became associated as "of counsel" with the law firm that was representing Padilla in workers' compensation proceedings (the firm). SCIF was the workers' compensation insurer for Padilla's employer.

In November 1987, Lerer's professional corporation and the firm together filed a negligence and product liability complaint for Padilla and his wife, alleging that Padilla's injuries had been caused by a defective safety strap, associated with the harness belt he had been wearing. The complaint originally named only the apparent manufacturer of the harness belt, Klein Tools, Inc. (Klein). In April 1988, Lerer added, by amendment for a fictitious name, the manufacturer of the safety strap, W.M. Bashlin Co. (Bashlin).

On September 16, 1988, Lerer wrote to Padilla that Lerer and the firm had insufficient evidence of the origin of the belt and safety strap, or of a defect in them, to proceed further with the civil case. Lerer enclosed a request for dismissal, as well as a substitution of attorney form, "should you wish to proceed with the case." Padilla signed the substitution, and in mid-1990 defendant John Paladin also substituted for the firm as attorney for Padilla.

At the trial, in October 1992, the court separately heard Bashlin's statute of limitations defense. The court found that within months of the accident Padilla had turned over to his attorneys a safety strap tagged with Bashlin's name, and they therefore had not been ignorant of Bashlin's identity and entitled to name it as a defendant, under Code of Civil Procedure section 474, more than a year after the accident.¹ The court similarly ruled with respect to the National Cable Television Institute, Inc. (NCTI), which had been named under section 474 in September 1990. Judgment was entered for Bashlin and NCTI on October 8, 1992. Having previously settled with Klein, Padilla obtained no relief through the trial.

On October 3, 1993, Padilla and his wife, again represented by Paladin, filed the malpractice case, against Lerer, one of his professional corporations,² and an associate attorney, as well as the firm and certain of its lawyers. The complaint alleged that the malpractice defendants had negligently named Bashlin and NCTI after expiration of the statute of limitations, resulting in loss of the product liability case. The complaint also assigned this alleged misfeasance as a breach of contract.

The malpractice action was commenced under a written agreement between the Padillas and SCIF, which had sought subrogation in the product liability case. Under the agreement, SCIF was to pay all necessary court costs, filing fees, and expert witness fees through the trial of the malpractice case, in exchange for which, in the event of a successful verdict or settlement, SCIF would receive its costs plus a scaled share of the recovery, up to its lien. SCIF's subrogation attorney Mahaffey executed the agreement for SCIF.

¹ Undesignated section references hereafter are to the Code of Civil Procedure.

² Another such corporation, which is a plaintiff-appellant herein, actually was not named.

In September 1997, Paladin obtained leave to amend the malpractice complaint to add a third cause of action, for fraud by concealment. It alleged that the malpractice defendants had concealed from Padilla the facts that he had had a meritorious case against Bashlin and that the defendants had failed to sue Bashlin timely, as a known defendant, instead naming it belatedly. The defendants had practiced this concealment by intentionally misrepresenting, in Lerer's September 1988 letter, that there was insufficient evidence to continue with the case. In reliance on the nondisclosure, Padilla had treated Bashlin as a viable defendant, and had pursued extensive discovery and trial proceedings against it. Padilla thereby sustained damages consisting of expenses of litigation, including discovery and expert's fees. The cause of action also prayed punitive damages.

Lerer moved for summary judgment or summary adjudication in the malpractice case. The court granted summary adjudication with respect to the fraud cause of action, but denied it with respect to the malpractice and contract claims, finding triable issues of fact.

The case proceeded to trial, in late 1996. The jury returned a special verdict in favor of Lerer and his codefendants, finding – after a “trial within a trial” – that Bashlin's safety strap had not been defectively designed, and that neither Bashlin nor NCTI had been guilty of negligence. Accordingly, the defendants had not deprived the Padillas of a valuable cause of action. The jury did not reach the question of professional negligence. Judgment was entered for Lerer and his codefendants.

The Padillas appealed from the judgment, and Division Five of this court affirmed it in September 1998. Lerer and two of his professional corporations (plaintiffs) then

commenced the present suit for malicious prosecution of the malpractice case, against, among others, the Padillas, Paladin, SCIF, and Mahaffey.³

SCIF and Mahaffey moved for summary judgment. The motion principally contended that the denial of Lerer's motion for summary judgment in the malpractice case established that it had been commenced with probable cause, thus negating an essential element of malicious prosecution. (See *Roberts v. Sentry Life Ins. Co.* (1999) 76 Cal.App.4th 375, 378, 383-384 (*Roberts*).) Paladin filed a joinder in the motion.

At the initial hearing of the summary judgment motion, the court's tentative ruling was to deny it but to rule out malicious prosecution with respect to the malpractice cause of action, as to which summary adjudication had been denied in the malpractice case. After submission, the court stated it was certain that the claim of malicious prosecution was barred insofar as it concerned the malpractice cause of action, and invited further briefing as to whether the motion should be granted with respect to the fraud cause of action in the malpractice case as well. After further briefing, the court ruled as follows: "The defendant's motion for summary judgment is treated by the Court as a motion for judgment on the pleadings and is granted; Plaintiff has 15 days to amend if he chooses to assert a claim not involving the malpractice cause of action against him."

Plaintiffs proceeded to file a second amended complaint for malicious prosecution, addressed to the fraud claim. SCIF and Mahaffey again moved for summary judgment. They contended that (1) probable cause had existed for the fraud cause of action; (2) SCIF and Mahaffey had not acted with malice; and (3) SCIF and Mahaffey had not been involved in the commencement of the claim, which Paladin had independently added to

³ The first amended complaint also contained other claims, which are no longer at issue or were directed at other parties who are not before us. The Padillas settled the case before judgment.

the malpractice case by amendment. Paladin filed a separate summary judgment motion, invoking the first two grounds of SCIF's.

SCIF's motion was heard first, and the court granted it, on grounds of both probable cause and absence of malice. The court stated that the fraud claim, although weak, had possessed "some objective tenability," and that Lerer's September 1988 letter to Padilla could be viewed as showing "concealment of the limitations problem." As for malice, the court perceived the defendants had not acted with improper motive or purpose, and took note of the showing that SCIF and Mahaffey had not participated in the decision to charge Lerer with fraud. The court subsequently granted Paladin's motion for summary judgment as well, also on grounds of probable cause and lack of evidence of malice.

DISCUSSION

Plaintiffs' first challenge to the summary judgments is a procedural one. They contend that the grants of summary judgment were improper in light of section 437c, subdivision (f)(2), which provides in relevant part that "a party may not move for summary judgment based on issues asserted in a prior motion for summary adjudication and denied by the court, unless that party establishes to the satisfaction of the court, newly discovered facts or circumstances or a change of law supporting the issues reasserted in the summary judgment motion." Plaintiffs contend that the motions under review were based on an issue – probable cause for the fraud claim in the malpractice case – that had been asserted and denied in the initial motion for summary judgment.

For several reasons, the summary judgments were not precluded by section 437c, subdivision (f)(2). First, that subdivision explicitly concerns only renewal in a summary judgment motion of an issue that was unsuccessfully raised in a prior motion for summary adjudication, under subdivision (f)(1) of section 437c. Here, however, defendants had made no such prior motion, but rather had brought a complete motion for

summary judgment, without an alternative prayer for summary adjudication.⁴ That alone distinguishes *Bagley v. TRW, Inc.* (1999) 73 Cal.App.4th 1092, on which plaintiffs rely. Second, the issue of probable cause for the fraud claim was not denied summary adjudication the first time around. Rather, the court treated the entire motion for summary judgment as one for judgment on the pleadings, and granted it, with leave to amend as to the fraud claim. Third, section 437c, subdivision (f)(2) would not have precluded the ultimate motions for summary judgment to the significant extent that they were based on new theories such as absence of malice.

Plaintiffs proceed to contest the trial court's determination that there was probable cause for the fraud claim.⁵ They argue that to be tenable, the claim required the element of reasonable reliance, on Lerer's alleged concealment that he had not sued Bashlin timely and efficaciously. Plaintiffs also rely on the fact that they obtained summary adjudication of the fraud claim.⁶

An essential element of malicious prosecution is that the subject claim have been initiated without probable cause. (E.g., *Sheldon Appel Co. v. Albert & Olier* (1989) 47 Cal.3d 863, 871 (*Sheldon Appel.*) Probable cause, or its absence, is determined objectively, by examination of the facts on which the defendant litigant, attorney, or other

⁴ Not only had defendants not sought summary adjudication of the fraud claim, the malicious prosecution complaint (first amended) had not referred to it.

⁵ Plaintiffs do not argue that the court erred in finding probable cause with respect to the malpractice cause of action.

⁶ Plaintiffs also refer to the court's initial ruling in this case, which granted defendants' motion for summary judgment as a motion for judgment on the pleadings, with leave to amend with respect to the fraud claim. That ruling did not establish probable cause for the fraud claim. A pleading decision, it signified at best that plaintiffs had stated or might state a cause of action for malicious prosecution of that claim. In fact, the first amended complaint's allegations of malicious prosecution, as to which judgment on the pleadings was granted, had not mentioned the fraud claim.

involved party acted. It does not depend on the defendant's subjective belief in the validity of the claim. (*Id.* at pp. 877-879, 881.) Nor does probable cause require that the defendant, particularly an attorney, have performed any particular degree of legal research or factual investigation before instituting the prior proceeding. Once more, the issue is whether the filing was objectively reasonable in light of what the defendant did know. (*Id.* at pp. 882-883.) The standard for probable cause is whether any reasonable attorney would have thought the claim tenable. (*Id.* at pp. 885-886.) Finally, the question of probable cause is one for court to determine, subject to de novo review on appeal. (*Id.* at pp. 874-877, 884-885; *Hufstedler, Kaus & Ettinger v. Superior Court* (1996) 42 Cal.App.4th 55, 63.)

The theory of the fraud claim was that by concealing his failure to sue Bashlin timely in the products case, Lerer had induced Padilla to continue to pursue the case against Bashlin, up to the point of a judgment based on its untimeliness, causing Padilla damages by way of the expenses of the unsuccessful prosecution. Plaintiffs impliedly contend that there was no probable cause to claim that Padilla reasonably relied on Lerer's concealment. Plaintiffs do not, however, point to facts belying the natural inferences that in continuing with the suit against Bashlin after Lerer abandoned it, Padilla relied on Lerer's failure to disclose the lateness of the charges against Bashlin, and that such reliance was reasonable. Thus, although plaintiffs argue that Paladin, as successor attorney for Padilla, would have discovered the untimeliness, they do not show that he did so. The underlying circumstances were sufficient to justify a reasonable attorney in alleging the element of reliance. (Cf. *Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 170 [probable cause for element of reliance in allegedly maliciously prosecuted fraud claim].)

Nor did Lerer's defeat of the fraud cause of action by summary adjudication signify or establish that it had been commenced without probable cause. Although denial of summary adjudication (as with the malpractice cause of action) has been held to reflect sufficient merit of a claim to establish probable cause for it (*Roberts, supra*, 76

Cal.App.4th at pp. 382-384; see *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 819-820), the converse is not true. Summary adjudication signifies that a cause of action cannot be established, either factually, legally, or both. (See § 437c, subds. (f)(1), (o)(1).) But that does not necessarily mean that no reasonable attorney would have believed it tenable at the outset, based on the facts the proponent knew. (See *Sheldon Appel, supra*, 47 Cal.3d at p. 885.) “Probable cause may be present even where a suit lacks merit. Favorable termination of the suit often establishes lack of merit, yet the plaintiff in a malicious prosecution action must *separately* show lack of probable cause. Reasonable lawyers can differ,” but only those “[s]uits which *all* reasonable lawyers agree totally lack merit” are lacking in probable cause. (*Roberts, supra*, 76 Cal.App.4th at p. 382 (original italics).)

We thus find no merit in plaintiffs’ challenges to the trial court’s determination that probable cause existed for the fraud cause of action in the malpractice case. That element of plaintiffs’ malicious prosecution claim having been correctly determined adversely, it is unnecessary to consider the parties’ further arguments regarding the question of malice. The judgments for defendants must be affirmed.

DISPOSITION

The judgments are affirmed.

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COOPER, P.J.

We concur:

RUBIN, J.

BOLAND, J.